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March 27, 2006

BY ELECTRONIC FILING

The Honorable Gregory M. Sleet
United States District Court
District of Delaware
844 North King Street
Lockbox 19
Wilmington, Delaware 19801

Re: *Thermo Finnegan LLC v. Applera Corp.*,
Civil Action No. 04-1505-GMS

Dear Judge Sleet:

Applera submits this letter in response to Thermo's letter of March 24, 2006 (D.I. 82), in which Thermo draws the Court's attention to the Federal Circuit's decision in *Atofina v. Great Lakes Chemical Corp.*, C.A. No. 05-1359 (Fed. Cir. Mar. 23, 2006).

Atofina reaffirms the principle underscored in *Phillips* that the intrinsic evidence is the primary source for determining the meaning of a claim limitation to one of ordinary skill in the art:

> Our primary focus in determining the ordinary and customary meaning of a claim limitation is to consider the intrinsic evidence of record, *viz.*, the patent itself, including the claims, the specification and, if in evidence, the prosecution history, from the perspective of one of ordinary skill in the art.

Slip op. at 7. The Federal Circuit adhered to this principle in affirming the district court's construction of the limitation "chromium catalyst" based on statements in the specification and prosecution history. *Id.* at 8-11. As Thermo notes, the Federal Circuit did conclude that it was

proper to rely on technical dictionaries to construe the term "catalyst," but it did so "[b]ecause there is no suggestion that the intrinsic evidence defines the term "catalyst...." *Id.* at 8. Here, in contrast, the intrinsic evidence does define the term "capillary electrophoresis" (the Court quoted a definition from the specification of the '654 patent in paragraph 2 of its March 9, 2006 Order), as well as the terms "anions," "target temperature," and others.

Atofina also reaffirms the principle that statements by an applicant during prosecution to distinguish claims from prior art may disclaim claim scope, even in instances where the distinction was not "absolutely necessary to avoid particular prior art." *Id.* at 11. This is particularly pertinent in this case to the construction of the phrase "detecting said anions by simultaneously monitoring said sample at two different wavelengths." *See, e.g.*, D.I. 60 at 28.

We are available at the Court's convenience should the Court have any questions on this or any other aspect of the claim construction issues before the Court.

Respectfully submitted,

Karen L. Pascale (No. 2903)

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